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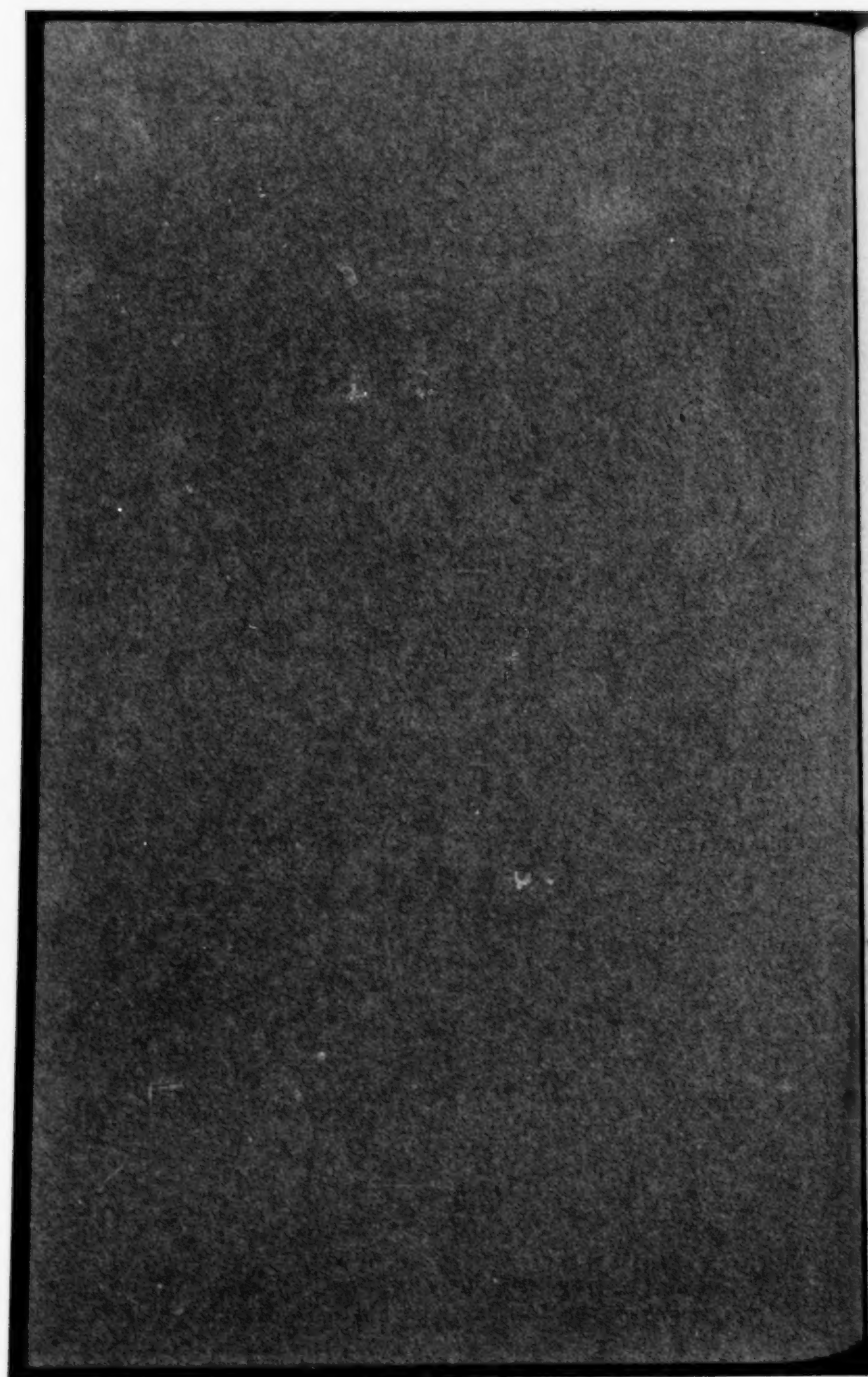
MISSION STATE BANK, a Corporation, *Petitioner,*

vs.

CHARLES EUGENE SPURGEON, by his next friend, Thomas
L. Brown, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, AND BRIEF IN SUPPORT.

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*To the Honorable Harlan Fiske Stone, Chief Justice of
United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioner, the Mission State Bank of Mission,
Kansas, respectfully presents this petition for review on
writ of certiorari of the decision of the United States Cir-
cuit Court of Appeals, Eighth Circuit (42-49), rendered
November 6, 1945, in the case of *Charles Eugene Spurge-
on, by his next friend, Thomas L. Brown, Appellant, vs.
Mission State Bank, a Corporation, Appellee*, No. 13102,
151 F. (2d) 762. On appeal from the District Court,

the sole issue before the Circuit Court of Appeals was the question of diversity of citizenship as affecting federal jurisdiction, and the case turned on the right of a minor to acquire a domicile of his own choice in the State of Kansas, separate and apart from that of his parents, who resided in Missouri.

The case was ruled by the Circuit Court of Appeals, as appears from its opinion, our summary statement, reasons relied on for allowance of the writ and brief, which follow, not on the controlling common law of Missouri, which the Circuit Court of Appeals was under a duty to apply, but on the modern trend or modern general law as perceived by the Circuit Court of Appeals. Therefore, among our grounds for applying for review on writ of certiorari are the identical grounds for which the writ was allowed in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

SUMMARY STATEMENT.

January 23, 1943, Charles Eugene Spurgeon, a minor, by next friend, filed his action for damages for false imprisonment against the petitioner, Mission State Bank, in the Circuit Court of Jackson County, Missouri, at Kansas City (2-7). The bank, a Kansas corporation and citizen and resident of that state, in due time filed its petition for removal to the United States District Court (6-8), alleging that plaintiff minor was a citizen and resident of Missouri, so that necessary diversity of citizenship existed. Bond was filed, and an order of removal was entered by the state court (9). Transcript on removal was duly lodged in the District Court (10), and the bank then answered (10-11).

April 16, 1943, plaintiff filed his motion to remand (11-12) in which he alleged that he, as well as the bank, was citizen and resident of Kansas, and that no diversity of citizenship existed between them. The motion was heard before District Judge Reeves. We briefly summarize the testimony before the District Court on the hearing:

Plaintiff Charles Eugene Spurgeon, hereinafter referred to as the minor, was born July 2, 1924. His parents resided near Queen City in Schuyler County, Missouri. His father died in 1926. Six years later his mother remarried, becoming Sarah Catherine Ballanger, and she continued to reside in Schuyler County. In December, 1942, the minor, then about 18 years old, left his mother's home and went to Kansas City, Missouri, to seek employment (15-16). His mother had nothing to do with his leaving home, she did not ask him to leave, nor did she want him to leave (17).

On reaching Kansas City, Missouri, the minor took board and lodging at the home of a Mrs. Poindexter. He had no extra clothes with him. He told Mrs. Poindexter he expected to be drafted at any time. He obtained employment at the Dickinson Theatres at Mission, Kansas, a close-in suburb of Kansas City, Missouri, and commuted back and forth until January 10, when he left Mrs. Poindexter's home (25).

January 2, 1943, the minor was arrested while in the bank, and was later released. He claimed that on January 10, 1943, he moved his residence to Mission, Kansas, with the intent to become a citizen and resident of that state (13). He slept in a small, unfurnished room in the theatre building from January 10, 1943, until March of that year when he was inducted (25).

The minor contended that the evidence showed he had been emancipated, so that he was legally capable of acquiring a domicile of choice, separate and apart from the domicile of his parents. The bank contended that under the law of Missouri, no minor, whether emancipated or not, could acquire a domicile of his own choice so long as either parent lived, and, further, that complete emancipation was not shown.

The District Court, in an able memorandum opinion (26-36), 55 Fed. Supp. 305 (Appendix "A"), held that as a matter of fact, complete emancipation was not shown, and ruled that the minor, being *sui non juris*, could not acquire a separate domicile of his choice under the law of Missouri, and the motion to remand was denied (32).

The cause proceeded to trial and plaintiff minor recovered judgment for actual and punitive damages (33-34). His appeal to the Circuit Court of Appeals, Eighth Circuit, in which he complained solely of jurisdiction of the District Court, followed, and that court, in its opinion

(42-49) (Appendix B), held that on the record, emancipation was shown as a matter of law and, ruling the case solely on the authority of foreign jurisdiction, held that the minor was legally capable of acquiring, and had acquired, a separate domicile of his own choice in Kansas, and that no diversity of citizenship existed. The Eighth Circuit reversed the cause with instructions to remand to the state court. After unavailing petition for rehearing (51-58), the bank presents this petition for review of the decision of the Eighth Circuit, on writ of certiorari.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Appeals, Eighth Circuit, on writ of certiorari, is invoked under Section 240 (a) of the Judicial Code, as amended June 7, 1934, c. 246, 48 Stat. 926, 28 U. S. C. A. Sec. 347, and Rule 38 of the Supreme Court of the United States as effective February 27, 1939. The opinion of the Circuit Court of Appeals was delivered November 6, 1945 (42), and the petition for rehearing was denied December 3, 1945 (59). This petition for review on writ of certiorari is filed within three months of either date and is therefore timely filed. 48 Stat. 926, 28 U. S. C. A. Sec. 350.

QUESTIONS PRESENTED.

I.

Since the question for decision turned on the common law of Missouri, was not the Circuit Court of Appeals in error in deciding the issue not on the common law of Missouri but on the law of foreign jurisdictions?

II.

Since the opinion of the Circuit Court of Appeals, Eighth Circuit, shows that its decision was based on what it terms the "modern authorities" which express new views not as yet adopted by the Missouri courts, did not that court act erroneously and contrary to the rule of this Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, and *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 445, 64 S. Ct. 208, 88 L. Ed. 168?

III.

Has the Circuit Court of Appeals authority to forecast changes in the common law of the State of Missouri and to change the common law of that state in accordance with such forecasts?

IV.

Does the decision of the Circuit Court of Appeals for the Eighth Circuit conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same subject matter in the case of *Delaware L. & W. R. Co. v. Petrowsky*, 2 Cir., 250 Fed. 554?

V.

Does the decision of the Circuit Court of Appeals conflict with this Court on the same matter in *Lamar v. Micou*, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. Ed. 751?

VI.

Can the Circuit Court of Appeals brush aside findings of fact made by a District Court and resting on substantial evidence, unless clear error appears?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Under the common law as adopted and in force in Missouri, no minor can acquire a separate domicile of his own choice so long as either parent is living. In its opinion the Circuit Court of Appeals acknowledges that no Missouri court has changed the common law rule, saying:

"* * * The appellant in this case had reached an age of discretion, and established his competence to care for himself before he departed from the home of his parents. In such circumstances, modern authorities, preferring reality to fiction, sustain the right of an emancipated minor to acquire a domicile of his choice. 'An emancipated child can acquire a new domicile of choice. Since he has to provide for himself, he should have power to choose his home.' Restatement of Conflict of Laws, Sec. 31. To the same effect, 1 Beale, Conflict of Laws, Secs. 30.1, 31.1; Goodrich on Conflict of Laws, Sec. 34; Dobie, Federal Procedure, p. 191. See also 30 Columbia Law Review 703. There are no Missouri decisions directly on the point. On principle, however, the Missouri cases cited above point to agreement with the modern rule.

"The cases in other States are in conflict. Where the right of an emancipated minor to select a domicile of his choice is denied, decision is usually based on the fact that a minor, being *non sui juris*, is legally incapable of effecting a change of domicile. Cases so holding are *Gulf, C. & S. F. R. Co. v. Lemons*, 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943; *Delaware, L. & W. R. Co. v. Petrowsky*, 2 Cir., 250 Fed. 554; and *Wiggins v. New York Life Ins. Co.*, 2 Fed. Supp. 365. Cases recognizing the rights of the minor are *Bjorn-*

quist v. Boston & A. R. Co., 1 Cir., 250 Fed. 929, 5 A. L. R. 951; *Woolridge v. McKenna*, C. C. Tenn., 8 Fed. 650; *Russell v. State*, 62 Neb. 512, 87 N. W. 344; and *Cohen v. Del. L. & W. R. Co.*, 269 N. Y. S. 667. The cases are noted in 5 A. L. R. 949. As stated in Goodrich on Conflict of Laws, Sec. 34(b), recognition of the right of an emancipated minor to choose a domicile 'merely gives legal effect to what is already the fact'." (48-49.)

The common law rule was laid down in *Delaware L. & W. R. Co. v. Petrowsky*, 250 Fed. 554, where the Circuit Court of Appeals, Second Circuit, said:

"The law is well established that every person at his birth acquires a domicile of origin, which is that of the person on whom he is legally dependent, which in the case of a legitimate child is that of its father, and in the case of an illegitimate child is that of its mother.

"The general rule is also well established that a person while a minor, being *non sui juris*, cannot change his or her domicile."

No Missouri court has expressly, or by implication, ruled that a minor can acquire a domicile of choice. No Missouri statute has changed the common law rule that a minor cannot acquire a domicile of choice. Therefore, the common law rule is still in effect in Missouri and it was the duty of the Circuit Court of Appeals to apply that rule, the common law rule alone, in deciding the case.

In *Erie R. Co. v. Tompkins*, *supra*, this Court laid down the rule, "Except in matters governed by the Federal Constitution or by Act of Congress the law to be applied in any case is the law of the state." The Circuit Court of Appeals failed and refused to follow the mandate of this

Court, and so committed error against your petitioner by deciding an important question of local law in a way in conflict with applicable local decisions and law, and on the express ruling of *Erie R. Co. v. Tompkins* this point alone constitutes a valid ground for allowance of the writ of certiorari.

II.

As shown by that portion of the opinion of the Circuit Court of Appeals which we have quoted above, that court ruled the appeal not on the applicable common law of Missouri, but on what it terms "modern authorities," and on cases from other jurisdictions. This constitutes another valid reason for the allowance of the writ of certiorari since it shows that the Circuit Court of Appeals has far departed from the accepted and usual course of judicial decision.

The Circuit Court of Appeals, Eighth Circuit, was bound to follow the mandate of this Court in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 445, 64 S. Ct. 208, 88 L. Ed. 168, in which this Court said:

"The law of a state is embodied as well in its common law rules as in its statutes. * * * The extent to which it shall apply in its own courts a rule of law of another forum is itself a question of local law of the forum."

In its opinion the Circuit Court of Appeals not only attempts to forecast the future course of the Missouri courts with the subject, but also by judicial legislation seeks to make new law for Missouri.

We respectfully submit that under the latest controlling authorities of this Court above referred to, it was beyond the province of the Circuit Court of Appeals to forecast

changes in Missouri law or to make them. By law, the right to change the common law of Missouri rests entirely with the courts and Legislature of that state.

III.

An additional compelling reason for the allowance of the writ appears on the face of the opinion of the Circuit Court of Appeals, which concedes that its decision is in conflict with the decision of the Second Circuit on the same matter in the case of *Delaware L. & W. R. Co. v. Petrowsky*, *supra*. The fact that the Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter is a valid ground for allowance of the writ under Rule 38 of this Court.

IV.

The decision of the Circuit Court of Appeals is in conflict with the rule laid down in the last controlling decision of this Court in the case of *Lamar v. Micou*, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. Ed. 751, where this Court said:

“An infant cannot change his own domicile.”

The opinion then goes on to say that as infants have the domicile of their father, he may change their domicile by changing his own and that on the death of the father the widow, by remarrying, does not change the domicile of the children, but that the children's domicile remains that of their father.

In our case the father was a resident of Schuyler County, Missouri, when he died, and although the mother remarried, her residence remained in Schuyler County,

Missouri, and Schuyler County, Missouri, under the very authority of this Court, expressive of the common law in Missouri, remained the residence of the minor, Charles Eugene Spurgeon, and the Court of Appeals was in error in failing to follow this Court and in ruling that the minor could legally change his own domicile.

V.

The question of emancipation is discussed at some length by the Circuit Court of Appeals which concludes that the minor was fully emancipated. The District Court, on motion to remand, had before it affidavits, depositions and some oral testimony, and while no formal findings of fact were made by that court, it is readily apparent from the memorandum opinion that the District Court concluded, as a matter of fact, that complete emancipation was not proved by the evidence.

We do not believe that the question of emancipation was necessary to decision, but whether it was or was not, we believe that the Circuit Court of Appeals for the Eighth Circuit erred in brushing aside the factual findings which appear in the memorandum opinion and in holding that the record showed, as a matter of law, that complete emancipation was present. The findings of the District Court were supported by competent, substantial evidence. The findings of the District Court are not clearly erroneous and the Circuit Court of Appeals erred in setting them aside. Rule 52(a), Federal Rules of Civil Procedure.

Prayer.

For the foregoing reasons, amplified and developed in the accompanying brief, your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for

the Eighth Circuit, commanding said court to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, that the decision and judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as is proper.

Respectfully submitted,

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